THE LEVESON INQUIRY INTO THE CULTURE, PRACTICES AND ETHICS OF THE PRESS ('THE INQUIRY')

WITNESS STATEMENT OF THE LORD O'DONNELL GCB

EXHIBIT 'LOD 1'

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47	Letter Gus O'Donnell to Gordon Brown MP	10 September 2010	Answer to Q31

From: [redacted] - Private Offices Group (Cabinet Office) [redacted]
Sent: 15 July 2011 16:11
To: 'PM & Private Office Support Team' [redacted]
Cc: jbowler [redacted], Heywood Jeremy - No. 10 [redacted]; Gray Sue - Propriety and Ethics Team (Cabinet Office) [redacted]
Subject: Ministerial Code amendment: transparency on media meetings

Dear Private Office

Please find attached a minute from Gus to the PM.

Regards,
[redacted]

[redacted] | Private Secretary | Cabinet Secretary's Office | 70 Whitehall, London, SW1A 2AS | telephone: [redacted]

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Cabinet Secretary and Head of the Civil Service

PRIME MINISTER

cc. Jeremy Heywood
James Bowler
Sue Gray

TRANSPARENCY – MINISTERIAL CODE AMENDMENT – MEDIA MEETINGS

1. In your statement to the House of Commons on 13 July you said you would be consulting me on an amendment to the Ministerial Code to require Ministers to record all meetings with newspaper and other media proprietors, senior editors and executives – regardless of the nature of the meeting. Permanent Secretaries and Special Advisers will also be required to record such meetings. And this information should be published quarterly.

2. I have been considering how this might work, and this note sets out a suggested way forward.

Timing

3. As a first step I recommend that we aim to include this additional information for Ministers in the quarterly publication for Ministerial meetings for the period 1 January – 31 March 2011 which we hope to be able to publish next week. For Permanent Secretaries and Special Advisers, I recommend we include the additional information for the period from 1 July onwards as in particular there has been no expectation on the part of special advisers that any of their information would be published.

Scope of media organisations

4. In terms of who would be covered by this, in the first instance I recommend we define these as the following, but that we keep this under review.

<u>Proprietors</u>	
Newspapers:	Chair, owner
Broadcasters:	chairmen
<u>Senior Editors</u>	
Newspapers:	senior editor
Broadcasters:	senior editors, channel controllers, directors of programming, radio controllers
<u>Senior Executives</u>	
Newspapers:	CEOs
Broadcasters:	Director Generals, CEOs

5. In the quarterly information that is currently published on Ministerial (or Permanent Secretary) meetings with external organisations, we do not normally include the name or job title of the individuals met, just the organisations they represent. My recommendation is that we now publish names. We are not proposing to include journalists in the publication. I met with two representatives from the Lobby this morning and this very much accords with their views.

Government, social and political meetings

6. Recording information about Government meetings with representatives of media organisations is of course straightforward. In some cases departments will already have been including such meetings in the current quarterly information that is published, although this may not have been done consistently.

7. For social and political meetings this is rather more complicated. This information may not be held by departments, so will be more complex to collect (relying in some cases on the individuals' own records of their activity). Information on 'political' meetings will probably be reasonably easy to get from Parliamentary offices if necessary. But the most difficult area is likely to be 'social' meetings. We have already had queries from departments seeking guidance for Ministers who may have media contacts as personal friends who may be captured by this publication.

8. I recommend we take a pragmatic approach to this, and keep this area under review, but where Ministers, Permanent Secretaries or Special Advisers are meeting individuals very clearly as long standing personal friends, and not discussing anything to do with their official roles it would seem unreasonable to expect them to have this information published. But where there could be any overlap with their official role I think we should advise them to record the interaction. Individuals will need to take responsibility for ensuring that there is an appropriate level of transparency in respect of all their contacts with members of the media.

9. The recording and disclosure of meetings in groups also needs to be pragmatic. If the Minister holds a reception for senior figures and colleagues on government premises this should be recorded and disclosed. If a reception is held off government premises and ministers are simply attending the same event (at which the Minister may or may not brush by a senior figure) this need not be recorded. Where meetings take place with a mix of journalistic and senior executive staff, they should simply be recorded as meetings with executive staff.

<u>Amendment to Ministerial Code and Special Advisers' Code</u>

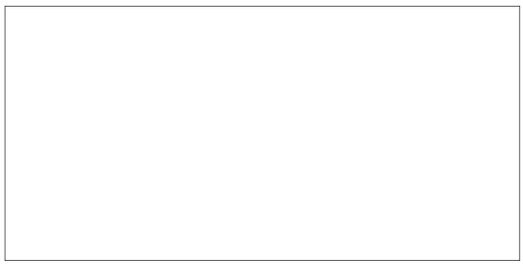
10. If you are content, I recommend that an additional paragraph is added to Section 8 of the Ministerial Code after the existing paragraph on ministerial meetings with external organisations (8.14) to read:

> 8.15 The Government will be open about its links with the media. All meetings with newspaper and other media proprietors, senior editors and

senior executives will be published quarterly regardless of the purpose of the meeting.'

11. I recommend a similar amendment to the Special Advisers' Code but I am not recommending an amendment to the Civil Service Code as this disclosure only applies to Permanent Secretaries.

12. Overall I recommend that we keep the proposed level of disclosure under review and we may have to make adjustments as we see how it works in practice. To seek to collate information for earlier periods is likely to be extremely resource intensive and not very successful as there has been no requirement for departmental diaries to hold political or social information. Nor do I see the case for widening the categories to include journalists. This should be our starting point which we should keep under review.



GUS O'DONNELL
15 July 2011

From: [redacted] Private Offices Group (Cabinet Office) [redacted]

Sent: 14 July 2011 13:40
To: jbowler[redacted]; Gray Sue - Propriety and Ethics Team (Cabinet Office) [redacted]
Cc: Heywood Jeremy - No. 10 - [redacted]; Craig Oliver [redacted]; Field Steve - No. 10 -; [redacted] Catherine Fall; [redacted]
Subject: RE: Transparency [UNCLASSIFIED] [Non-Record]

James,

Gus met [redacted] and [redacted] earlier to hear their initial views on this. They said they would write in with more once they've consulted colleagues (how would this feed in?)

On scope: they agreed that all the executive categories you list below should be covered, but argued strongly – and Gus was sympathetic – that it definitely shouldn't cover journalists and ideally should not extend below senior editors.

There were a couple of grey areas they wanted to reflect on: e.g. what if the PM met with an editorial board to brief on the new political strategy?

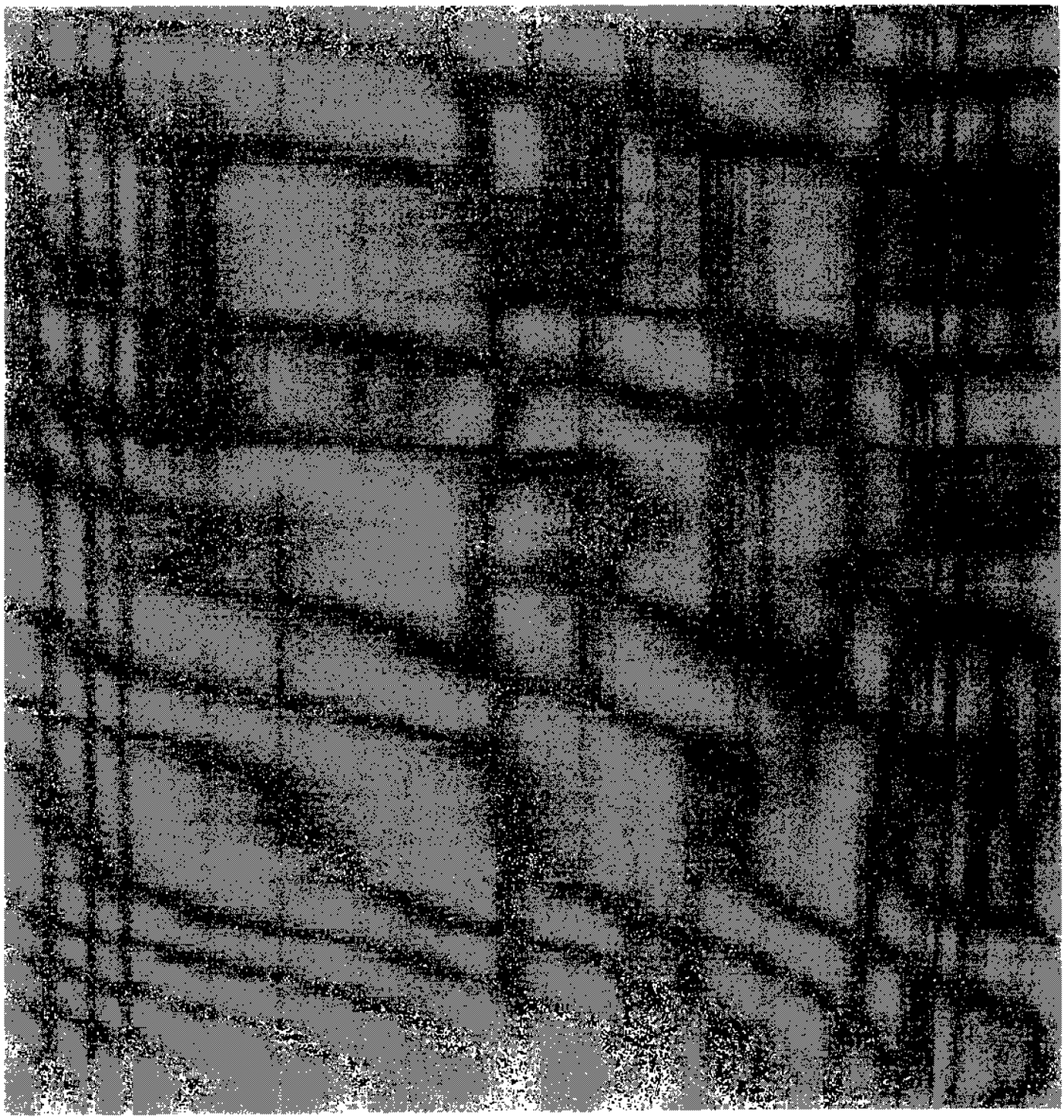
They raised a question, worth considering, of whether names of individuals or organisations should be disclosed (including for hospitality purposes).

Finally, they discussed what was disclosable if e.g. a minister attended a function with execs present. The conclusion seemed to be that it would be impractical to list all the relevant attendees at a large event but reasonable to expect disclosure of a small private event where executives had a lot of opportunity for contact with the minister.

[redacted]

CabinetOffice

Propriety Guidance



CONTENTS

PROPRIETY

Propriety guidance and the Civil Service Code define how civil servants can properly and effectively present the policies and programmes of the Government. It is vital that Government communicators do their work objectively and without political bias. This guidance has been developed to inform them of their responsibilities and provide advice for specific situations they may encounter.

CODES OF CONDUCT

The Cabinet Office is responsible for codes of conduct for civil servants, ministers and special advisers.

Civil Service Code

The Civil Service Code, introduced in 1996 and revised in June 2006, sets out the standards of behaviour expected of all civil servants. The code is based on the core Civil Service values of integrity, honesty, objectivity and impartiality.

Individual departments may also have their own separate mission and values statements based on the core Civil Service values.

Guidance for departments on sponsorship

The Guidance for Departments on Sponsorship provides advice on best practice for people in government departments involved in seeking sponsorship.

GUIDANCE ON GOVERNMENT COMMUNICATIONS

Guidance on government communications defines how civil servants can present the policies and programmes of the government of the day properly and effectively.

The following basic criteria have been applied to government communications by successive administrations. The communication.

- should be relevant to government responsibilities;
- should be objective and explanatory, not biased or polemical;
- should not be – or liable to be – misrepresented as being party political; and
- should be conducted in an economic and appropriate way, and should be able to justify the costs as expenditure of public funds.

Publicly funded government communications cannot be used primarily or solely to meet party political objectives. However, it is recognised that the governing party may derive incidental benefit from activities carried out by the Government.

The Ministerial Code requires ministers to uphold the impartiality of the Civil Service. They must not ask civil servants to act in any way that conflicts with the Civil Service Code. Ministers must ensure that public resources are not used to support publicity for party political purposes.

There are additional issues which must be considered in the run-up to local, general or European elections or referenda. Specific election guidance is published by the Cabinet Office prior to each event.

POLITICIANS AND THE PRESS OFFICE

It is the duty of press officers to present the policies of their department to the public through the media, and to try to ensure that they are understood. The press officer must always reflect the ministerial line clearly, even where policies are opposed by opposition parties.

As part of the Government's duty to govern, it needs to explain its policies and decisions to the electorate. The Government has the right to expect the department to further its policies and objectives, regardless of how politically controversial they might be.

Press officers have a duty to abide by the Civil Service Code and to remain objective and impartial, especially when dealing with politically controversial issues.

Sections available here are:

- Press office dos and don'ts
- Dealing with ministers
- Announcing new policies
- Ministers' private interests
- Ministers and communications officers

Press office dos and don'ts

To work effectively, press officers must establish their impartiality and neutrality with the news media, and ensure that they deal with all news media even-handedly. The press officer's specific role is to help the public – by helping journalists – to understand the policies of the government of the day.

Do's

- Present, describe and justify the thinking behind the policies of the minister.
- Be ready to promote the policies of the department and the Government as a whole.
- Make as positive a case as the facts warrant.
- Speak on the record as a departmental spokesperson wherever possible, and avoid unattributed quotes.
- Insist that all political aspects are handled by the party political press office or special adviser.
- Feel free to discuss any aspect of propriety with your head of news.

Don'ts

- Justify or defend policies in party political terms.
- Expressly advance any policy as belonging to a particular political party.
- Directly attack the policies and opinions of opposition parties and groups (although, on occasion, it may be necessary to respond in specific terms).
- Oversell policies, re-announce achievements or investments and claim them as new, or otherwise attempt to mislead the public

On a day-to-day basis, press officers should take particular care when handling:

- decisions taken by ministers fulfilling their statutory responsibilities which directly affect individuals or groups. These must be handled with particular care, to secure an impartial and objective presentation of the case that avoids inaccuracy, inconsistency or bias;
- ministerial speeches or statements; and
- ministers using the press office to ensure that their policy and actions are explained and presented in a positive light. Ministers can do this, but care must be taken that any press activity is designed to further government objectives.

Dealing with ministers

Ministers don't always acknowledge the distinction between government communicators and their own party political spokespeople. Consequently, ministers may sometimes ask the press office to issue speeches or statements that cross the border of propriety.

In such cases, it is right to explore whether a compromise can be reached that will not breach propriety. If no such compromise can be found, then it will be necessary to give a polite refusal which, if necessary, will be supported by the department's permanent secretary or chief executive.

For example, if a speech by a minister included an attack on their political opponents, it would be improper for the department to issue it as an official text. The political attack would have to be omitted from the official release. If the minister wished the full speech to be issued, it would have to come from the press office of the political party.

Issuing official texts

To some extent, the venue for ministerial speeches will determine whether or not texts can be issued by departments. Speeches made at conferences, rallies or occasions organised by political parties should usually be issued by party press offices. All others can be issued as official texts – unless they contain party political messages.

Civil servants should not be asked to attend or take part in party conferences with their minister. However, not everything that happens at a party conference is taboo – a minister may use it to make an important policy announcement. In such a case, the communication directorate would expect to be told in advance and to be fully briefed to deal with consequent press enquiries. It might even be necessary to arrange a press briefing, but if this is the case, it would be held away from the party conference. Normally, the minister's special adviser will arrange such a briefing. The announcement could be used in a departmental press release without referring to the party occasion.

There will be borderline cases. In these instances, the director of communications will be responsible for weighing up the matter and deciding whether publishing an official release might risk damaging the integrity of the department. Invariably, it would be better to suggest that such material be issued through the political channels.

Announcing new policies

Any announcement of a new policy must always respect the primacy of Parliament. If a minister announces a new policy outside the House, they risk being reprimanded by the Speaker.

The announcement must reach all MPs via an Answer to a Parliamentary Question or a Statement. An Answer or Statement must clearly state the timing of the announcement and copies of relevant material must be available in the Houses of Parliament at that time. Departmental parliamentary clerks are able to offer advice on this. In recess, a press notice can be used if it is copied to the relevant select committee chair and placed in the Library of the House.

In the sense that government communicators work directly with and for ministers who are politically motivated, government communications cannot be free of political content. But at all times it is essential to remember that, as civil servants, government communicators cannot join the political battle. They should do nothing that leaves ministers and the department open to criticism in this respect.

Mixing [illegible] private interests

Journalists do not discriminate between official and private activity, which means that communications officers may find themselves dealing with enquiries about ministers' holidays, families and other issues, possibly during official duties such as press briefings on policy change. Normally these would be dealt with by the minister's constituency office, but if the enquiry is about a minor matter, the press office can deal with it, if the minister wishes.

In cases of doubt, directors of communication may want to consult the permanent secretary.

Ministers and communications officers

Working with ministers can be exciting and rewarding, and often leads to government communicators becoming highly motivated and involved. The nature of political office means that ministers will also take a close interest in the work of the press office. Like all civil servants, government communicators must maintain a professional distance from ministers and abide by the [illegible] at all times.

Communicators and other public resources are provided to help ministers explain the Government's policies in a positive light. Government communicators or other resources cannot be used for image-making, which is the province of the party political machine. Ministers must be protected from accusations of using public resources for political purposes, and they have a duty under the Ministerial Code to protect the integrity of civil servants.

Individually, communicators must behave in a way that will allow them to work for any future minister of any future government. They must also work effectively as part of a team that includes ministers, special advisers and other government communicators inside and outside their department.

It is in everyone's best interests to build and maintain a good working relationship with all members of the team. And that relationship should be firmly grounded in the rules that set out what the different players can and cannot do, and what they should not be asked or persuaded to do.

Communicators' methods of work vary between departments. However, a common factor is that a communications officer's work focuses on particular policy areas. Where these policy areas coincide precisely with a minister's responsibilities, one communications officer will work constantly and closely with that minister and their private office. Sometimes, this relationship is referred to casually as a 'personal press officer', but this term should not be used, because it implies duties that are beyond those of a civil servant.

In a complex department, individual ministers' responsibilities may overlap policy directorates, and thus overlap press desks. In that case, the minister will be served by more than one communications officer.

The director of communications is responsible to the permanent secretary for ensuring that communicators understand the limits of their remit, providing any necessary support and advice.

Occasionally, a minister may ask for a dedicated communications officer or even a specific member of staff. This is a matter that directors of communications may wish to discuss with their permanent secretary and the minister responsible for the department. It might be necessary to explain why the best support for the presentation of the Secretary of State's policies would be adversely affected by disrupting the press office teams.

PAID PUBLICITY

The propriety challenges facing government communicators who work in publicity may be more subtle than for those working with ministers, but they are no less important. An enormous amount of public funds are spent on campaigns every year. It is essential that the cost of this paid publicity can be justified.

The Government has a duty to inform the public about legislation, policies, the services available to them and their rights and liabilities. All communications and marketing programmes must be considered in the light of propriety and value for money. Government communicators are advised to keep a record of the options considered and the rationale for the decision taken

Paid publicity may be used where the Government believes that a direct approach to the public is needed to give more information about particular issues and policies. This type of publicity is wide ranging and may follow legislation which has given the public new entitlements or obligations. For example, it may be to encourage greater take-up of entitlements or to inform the public of actions that the Government proposes to take. Whatever the publicity is for, it needs to comply with Ofcom regulations on television and radio advertising.

All paid publicity work must be objective, factual, appropriate and intended to communicate government policies. It should not be, or appear to be, used for party political purposes. This applies to all aspects of the work, including content, context, treatment, style, tone and quality of presentation. The cost of any paid publicity must be justified and in proportion to the message being communicated.

The Government also has a responsibility and a right to use publicity to encourage behaviour that is in the public interest (for example crime prevention or road safety advertising). These campaigns may include leaflets, posters, displays, newspaper advertisements, TV commercials and advertising carried on items ranging from buses to takeaway food containers. Some of these simply provide factual information and practical advice, but others need to be more persuasive in content and presentation. Similar publicity is used to explain changes in the law that affect individuals or businesses, or the work of their professional advisers, Citizens Advice Bureaux, etc

There may be some sensitivity where the matters publicised are the product of controversial legislation or potentially controversial policies. However, the Government still has a responsibility to inform the public of policy and legislative changes. Communications officers must ensure that the information is presented in an objective way that concentrates on informing the public about the content of legislation and how it affects them.

Types of publicity - definitions

The Government may use a variety of media, including paid and unpaid publicity, to achieve its objectives.

Paid publicity includes:

- paid advertising in the press, on radio and on television,
- government-produced or sponsored software and video material,
- leaflet campaigns,

- material placed on the internet; and
- exhibitions, etc.

Unpaid publicity includes:

- papers presented to Parliament as White and Green Papers and other consultation documents that are sold to the public;
- press notices,
- public inquiry unit and other official briefing material; and
- printed and other information which carries government support but may be paid for, or sponsored, by a third party

The main forum for the presentation and discussion of government policies is Parliament. Major policy proposals are usually presented to Parliament as Command Papers, which can be sold to the public. Other proposals (paper-based or electronic) on which comments are invited may be set out in less formal documents, which may be sold or free of charge. They are deposited in the libraries of the House of Lords and House of Commons at the time of publication and may be sent unsolicited to those with a known interest in the subject.

The public can also get information free of charge through departmental press offices or GNN's (the Government News Network's) distribution service by means of press notices or other briefing.

Papers, briefings and documents set out what the Government is doing and what it wants to achieve and may cover topics that are politically controversial. In this case, communications officers must ensure that the content and tone remain objective, impartial and within the rules of the Civil Service Code.

Paid publicity dos and don'ts

- Make sure that the topic is relevant to the Government's responsibilities.
- Make sure that the resources used are proportional to the objectives, affordable and represent good value for money.
- Make sure that the channels and media are targeted effectively to make best use of resources.
- Ensure that there are clear goals and targets.
- Set out clear success measures and ways in which they will be evaluated, especially where publicity aims to change the behaviour of individuals.
- Check whether the publicity required can be achieved through existing channels, e.g. parliamentary announcements, ministerial speeches or regular publications.
- Encourage creativity to make the most of limited budgets.
- Stick to facts and avoid political bias.
- Make sure that the communication is not used for party political purposes.
- Keep a record of the options considered for the campaign and the rationale for the decision taken.
- Observe parliamentary privilege, particularly when arranging publicity for White Papers or other, similar, documents.
- Remember that not all legislative proposals are automatically approved by Parliament.

Distribution

Unsolicited material

Distribution of unsolicited material must be carefully controlled. As a general rule, publicity touching on politically controversial issues should not reach members of the public unsolicited, except where the information clearly and directly affects their interests.

The level of intrusion is highest for television, radio, newspaper and poster advertising and material delivered to people's homes, and lowest for material available only on request.

Leaflets – the general rule

Leaflets may be issued:

- in response to individual requests, or enclosed with replies to related correspondence; or
- to organisations or individuals with a known interest, or, with the organisation's agreement, in bulk for distribution at their own expense to their membership only

Justifying the costs of paid publicity

Spending public money on direct communication with the public is one of the areas most sensitive to propriety issues.

It is right and proper for government to use public funds and resources for publicity and advertising to explain their policies and to inform the public of the government services available to them and of their rights and liabilities. However, these resources may not be used to support publicity for party political purposes.

This rule governs not only decisions about what may or may not be published, but also the content, style and distribution of what is published. The tests on value for money must be applied, and the costs of paid publicity must be justified.

Ofcom guidance on advertising

Political advertising is covered by the Communications Act 2003 and is regulated by the Office of Communications (Ofcom). Publicity/campaign managers need to ensure that any paid-for information complies with the Act.

All publicity and campaign work must comply with the rules on propriety. In addition, publicity/campaign managers should consider whether a paid-for information campaign contravenes the Communications Act 2003 in relation to political advertising. Consideration will be particularly relevant if the publicity manager is asked to produce a campaign which they feel breaches the conventions on propriety.

Publicity managers should be aware that Ofcom has retained responsibility for the regulation of political advertising. In all other respects, the regulation of broadcast (in addition to non-broadcast) advertising passed to the Advertising Standards Authority (ASA) on 1 November 2004.

The Communications Act contains the following requirements in relation to the regulation of political advertising (which could include government information campaigns):

- Information campaigns should not be directed towards a political end or be of a political nature.
- Information campaigns should not be partial.
- Information campaigns should not promote (i.e. sell) a government policy.
- Information campaigns should not influence public opinion on a matter which is, in the United Kingdom, a matter of public controversy.

Although not explicitly spelt out in the Act, the following further guidance is included regarding areas that could be problematic and therefore likely to be referred by the regulator to Ofcom:

- Information campaigns cannot be used to list the Government's achievements.
- Information campaigns cannot be used to provide balance to an argument or to put the record straight (e.g. in the case of biased or inaccurate media reporting).
- Approval for information campaigns may be withdrawn by the regulator (ASA) on the advice of Ofcom, if the campaign itself creates genuine public controversy.

Direct marketing

'Direct marketing' is a term used to cover publicity methods that either involve a direct approach to an individual or seek a response directly from an individual.

Direct marketing is a valuable, cost-effective, measurable media channel. However, when unsolicited, it can be regarded as intrusive and a nuisance. Inappropriate use in the past by commercial organisations has led to unsolicited material being labelled as 'junk mail'. This has created resistance among some recipients.

Direct marketing includes:

- direct mail;
- household distribution;
- telephone sales; and
- all advertising that incorporates a response mechanism, e.g. clipping coupons from a newspaper.

Government use of direct marketing

The Government uses direct marketing when it needs to communicate directly with a specific target audience.

Appropriate use of direct marketing

Direct marketing techniques are a valuable part of the range of publicity media available to government, often offering cost-effective and measurable solutions to many publicity problems. However, some of the techniques are seen as intrusive, and some commercial users have sent out material to inappropriate recipients. Against this background, departments must take care if they are to obtain the benefits while avoiding criticism.

As a publicity medium, direct marketing is covered by the general guidance on government publicity. As that guidance makes clear, it is unlikely that the unsolicited distribution of material about policies that require – but have not obtained – parliamentary approval will be considered proper. In other cases, direct marketing may be appropriate.

Criteria for using direct marketing

Before embarking on a direct marketing initiative, departments must satisfy themselves that its use can be justified according to the following criteria:

- Is direct marketing appropriate for the campaign and is its use within the general guidance on propriety and value for money?
- Will the direct distribution of material be considered over-intrusive by recipients?
- Are suitable, reliable and accurate address lists available, and will their use be within the guidelines set by the Data Protection Registrar?
- Are other departments planning to approach the same audience over the period of the campaign?

PUBLIC RELATIONS (PR)

Government departments can use PR consultancies or agencies for some work, provided that certain criteria are met.

Using PR consultancies

As a general rule, PR consultancies

- cannot represent ministers. Only civil servants who are directly controlled and answerable to ministers may explain ministers' policies and deal with the media or others on their behalf,
- cannot be used for any task that would be improper for a civil servant, such as opinion-forming in political support of ministers or image-building; and
- must not be used when internal resources are available for the task.

There are some tasks for which a PR consultancy might properly be employed. However, the nature of the work should drive the selection of the consultancy, not the name of the PR firm. For example, financial PR agencies have been engaged on a consultancy basis in the privatisation of nationalised industry, following Parliament's approval of the privatisation. Other PR agencies have been used for design and other presentational purposes, such as support for publicity campaigns of a strictly uncontentious nature.

The use of a PR consultancy or agency must meet all propriety, procurement and value-for-money criteria. Within these parameters, PR consultancies can be used to help deliver strictly non-contentious publicity programmes.

Criteria for appointing a PR consultancy

Before engaging a PR consultancy, departments must satisfy themselves that the appointment meets the following criteria:

- Is the task to be done relevant to government responsibilities?
- Could it be carried out by the Government's own employees? If not, can the appointment of a consultancy be justified as a cost-effective way of reaching the target audience and provide the best value for money?
- Does the use of a consultancy in this case comply with the rules of propriety?
- Is the task discrete and closely defined?
- Are the supervisory arrangements adequate to keep the consultancy to its brief?
- Are the arrangements for the appointment thorough and clear?

PR consultants should be made aware that there are rules covering government publicity and they should be carefully controlled and supervised. Consultants should only be used to deliver specific work and must stay within the brief. For example, a firm hired to redesign a logo should not develop into building up an image or corporate identity

Written brief

If you are using an outside PR agency, it is important to have a clear and concise brief. The brief should cover background details and research, objectives and aims, target audiences, markets and resources. Make sure it also includes a timetable, budget, any particular constraints and considerations – and evaluation techniques.

Departmental advice

If departments have any doubts about the propriety of engaging a PR consultant for a publicity task, they should seek the advice of their departmental director of communications, who may turn to the head of profession, who may further suggest seeking the advice of the Cabinet Office Propriety and Ethics Team.

COMMERCIAL AND LEGAL SENSITIVITY

The purpose of this section is to give guidance on legal and other restrictions that can affect the reporting of criminal proceedings, and demonstrate how to deal with media enquiries about criminal cases.

Checklist

- Be aware of the potential sensitivities affecting civil and criminal proceedings and commercially sensitive information
- Understand the restrictions that affect news reporting of such information.
- Ensure that reporters are made aware of these restrictions, whenever necessary.
- Always check with legal advisers or appropriate officials before using advice that has not been updated very recently.

Commercially sensitive information

There are legal constraints governing the release of some commercially sensitive information. The implications for communicators can be very important. The unsanctioned release of certain categories of information can result in legal action against the offender.

The two types of information that require such careful handling are 'commercial in confidence' and 'market-sensitive' information.

Commercial confidentiality

'Commercial confidentiality' usually relates to information surrounding the negotiation of contracts where price is the determining factor. Such information has a bearing on the fairness of contract negotiations and could be of advantage to others involved in negotiations.

Market sensitivity

'Market sensitivity' refers to information that could affect share prices or the value of sterling and/or exchange rates. Some examples of market-sensitive information are.

- merger decisions – either referral to the Competition Commission or their clearance by the Secretary of State for Trade and Industry;
- decisions by the utility regulators; and
- the release of official statistics, such as the retail prices index

In such cases, information is usually released at a time when markets are not trading or in such a way that ensures an orderly market. This is usually achieved through the use of the London Stock Exchange's regulatory news service (known as TOPIC), which is disseminated via computer link to the market. TOPIC ensures that announcements, particularly those that might affect market activity and the price of securities, are validated and communicated promptly. Where relevant, the London Stock Exchange and the Department of Trade and Industry press offices encourage communications officers to seek advice on this issue.

Criminal proceedings

Some departments conduct criminal prosecutions. As well as presenting and dealing with queries about policies and performance, their communications officers will also need to deal with media interest in particular cases.

There are statutory and common-law restraints, as well as specific reporting restrictions – temporary or permanent – which the court may impose on particular cases.

Great care must be taken when providing background information or promoting the work of the organisation to ensure that no information is given that could prejudice proceedings, identify protected victims or witnesses, or otherwise give rise to contempt of court.

Journalists, editors and their legal advisers should be aware of the restrictions that govern the reporting of proceedings and it is their responsibility to ensure that published material is within the legal requirements that apply to that case. But communications officers representing prosecuting authorities have a particular responsibility to know and respect the rules and restrictions that apply, particularly when seeking to attract media interest or briefing on a background basis.

Communications officers operating within these rules should be fully trained and have ready access to advice about what can and cannot be reported about criminal proceedings.

The following is a summary of the main considerations and reporting restraints. A useful source of further information is McNae's *Essential Law for Journalists* (Oxford University Press, 2005).

Reporting restrictions under the Magistrates' Courts Act - 'sub judice'

Once legal proceedings are active – i.e. from arrest or issue of a warrant for arrest right through the magistrates' court or Crown Court – reporting restrictions apply. Restrictions lapse after sentence, but if an appeal is lodged, legal proceedings are active again.

After arrest and charge, and before trial, the media may report only the following information:

- the name of the court and names of the magistrates;
- the names, addresses and occupations of the parties and witnesses and ages of the accused and witnesses;
- the offence(s), or a summary of them, with which the accused is charged;
- the names of counsel and solicitors in the proceedings;
- any decision to commit the accused, or any of the accused, to trial and any decision on the disposal of the case of those not committed;
- the committal charges, or a summary of them;
- the court to which the case is committed;
- in cases where proceedings are adjourned, the date and place to which they are adjourned;
- whether bail has been granted and any conditions (but not the reasons for its being opposed or refused), and
- whether legal aid was granted.

At this stage, communications officers should release no more than this information to the media.

There are tighter restrictions on the reporting of cases involving juveniles and sexual offences. The rules are complex and, if necessary, you should consult reference books or a lawyer.

The accused can apply to have the reporting restrictions lifted. In this case, the magistrates are required to make an order to lift them. If there is more than one accused, they all have the opportunity to make representations before a decision is taken.

It is not advisable to release or confirm the name of a person who has been arrested until they have been charged. This is because that person may not be charged and may complain that they have been tried and

convicted by the media. It is not appropriate to give the race, colour, religion or sexual orientation of the defendant unless it is directly relevant to the prosecution.

Contempt of court

During a trial, the media are entitled to publish or broadcast a fair and accurate report of legal proceedings held in public while proceedings are active (Section 4(1), Contempt of Court Act 1981). This means the evidence is given in open court. Often journalists who have not attended court will ask what happened. Be careful, as you will not know exactly what has been said unless you were present.

You must not give details of evidence that has not been given in open court or that has been excluded by the judge.

A judge or magistrate can impose reporting restrictions, particularly in cases involving children and young people, or if future proceedings may be prejudiced by reports of the current trial. Journalists are responsible for complying with these restrictions. The court has a responsibility to display Contempt Orders and Orders under the Children and Young Persons Act publicly, and inform journalists about them on request.

What happens if these reporting restrictions are breached?

If you give information that is subject to an Order restricting publication, and the media publish or broadcast it, proceedings for contempt may be brought against the publisher or broadcaster. You may find yourself mentioned by name in those proceedings and you and your department will be criticised and reported to the Attorney General. The defendant may argue that they cannot get a fair trial and the judge may agree and order an acquittal.

Pre-trial briefings

Pre-trial briefings by government officials or lawyers should be given only in exceptional circumstances, as there could be a risk of substantial prejudice to the trial. In addition, the defence may ask for material to be disclosed to them. You should seek advice from senior lawyers, and the consent of ministers or the head of the organisation. Any briefing should be limited to carefully selected journalists and should be strictly controlled. Details of evidence should not be given. Journalists must sign an undertaking not to use any of the background information until after the verdict. Briefings during the judge's summing up, after all the evidence has been given, are usually preferable.

There is usually no problem with holding on-the-record briefings or press conferences or issuing statements or press releases after the verdict, but bear in mind that there may be an appeal.

Counsel's opening speech, which summarises the prosecution case, may be released to the media on a 'check against delivery' basis, so that it can be published after the jury has heard it.

Reporting breaches or contempt of court

If you believe a report of a criminal case in which your department is involved may be in contempt, or in breach of the restrictions in the magistrates' court, or if you hear of any forthcoming report which may cause concern, you should obtain all the information you can and contact the lawyer involved as soon as possible.

If the report has already appeared, the Crown's lawyer will consider whether it should be drawn to the attention of the judge or magistrate. If the report has not yet been published or broadcast, an injunction may be sought. This is a matter for the law officers.

Guidance has been prepared by the Treasury Solicitor on the correct procedures for communications officers. It is advisable to keep a copy for out-of hours duty.

Civil jury trials

Civil cases are usually heard by judges sitting without a jury, but there are some exceptions to this rule.

Civil jury trials seldom involve government departments directly. The exceptions are civil cases heard by a jury and relating to:

- libel;
- slander; and
- actions against the police for alleged wrongful arrest, assault and malicious prosecution.

Judicial reviews

The area of civil law in which departments are most likely to become involved is judicial review. Judicial review is the procedure by which decisions by the executive can be challenged on the grounds of irrationality, perversity, breach of natural justice and procedural impropriety. Such actions often name the relevant Secretary of State, which leads the media to request statements from the department.

Judicial reviews are frequently brought on behalf of individuals, with the support of pressure groups that are recognised by the courts as having the necessary legal standing to bring proceedings in matters concerning them, even though they are not directly affected by the decision under review.

Judicial reviews may themselves be the subject of review by a higher court (the House of Lords or the European Court of Justice), in which case there is little substantive comment that may be made by government spokespeople. Nevertheless, communicators would be well advised to keep a close eye on matters that may call for a response from the department.

THE LEGISLATIVE ENVIRONMENT

The day-to-day work of government communicators must be understood in the wider context of the legislative environment. There is a range of legislation relating to the work of government communicators and they should, at least, have awareness of data protection, Welsh language, disability discrimination, freedom of information and copyright.

Checklist

The work of government communicators must:

- conform to the principles of the Data Protection Act;
- deliver information in ways that meet the specific requirements of people with disabilities;
- when appropriate and reasonably practicable, treat the Welsh language as equal with English, and not just as a translation;
- be aware of the Freedom of Information Act,
- for all commissioned material, consider seeking a formal assignment of copyright in favour of the Crown; and
- keep up to date on current legislative changes.

Data protection

The Data Protection Act 1984 gives legal rights to individuals in respect of personal data held about them by others. Departments should be aware of the Data Protection Act 1998, implemented in March 2000, which introduced significant changes to the 1984 Act. As well as covering automatically processed information, certain manual records are now covered by the Act. Individuals also have rights to prevent processing for purposes of direct marketing.

The Act applies to government departments in the same way as to any other data controller. Where necessary, departments are obliged to notify, i.e. register with, the Information Commissioner and to abide by the eight data protection principles.

In summary, personal data should be:

- processed fairly and lawfully and not unless certain conditions are met;
- obtained for specified and lawful purposes and not further processed in a manner incompatible with that purpose,
- adequate, relevant and not excessive for the purpose;
- accurate and, where necessary, kept up to date;
- processed in accordance with the rights of the individual,
- kept no longer than is necessary for the purpose;
- protected by appropriate security, and
- not transferred without adequate protection

The [illegible] website provides comprehensive information on the Data Protection Act.

Welsh language

The [illegible] applies to public bodies that provide a service to the public in Wales. Although government departments and Crown bodies are not bound by statute to adhere to the Act, the Government gave an undertaking that they would do so. This applies when the service is provided to people in Wales, regardless of the location of the supplier. The principle of the Act is that, 'In Wales the English and Welsh languages should be treated on the basis of equality.' Welsh should not be treated just as a translation, if it is appropriate and reasonably practicable for it to be treated with equality

Government departments, Crown bodies and those public bodies covered by the Act are under an obligation to draw up a scheme for approval by the Welsh Language Board (established under the Act). Schemes should include measures that

- are descriptions of the services available in Wales;
- are practical arrangements,
- put in place an implementation and monitoring framework;
- include an implementation timetable; and
- are more than policy statements

You are advised to check whether your department's scheme has been submitted and approved. If this is the case, you must ensure compliance.

Disability discrimination

The [illegible] gives disabled people rights in the areas of employment, receiving goods and services, and property. The Act affects anyone providing goods, facilities or services to the public, whether paid for or free

Communicators must consider how information can be delivered in accessible ways for people with disabilities These could include, for example, large print, Braille or audio versions of literature and/or minicom services on the telephone.

Conferences, seminars and launches should include special provision for those with disabilities, if it is reasonable to do so.

More information on the Disability Discrimination Act can be found on the [illegible]

Freedom of information

The [illegible] came fully into force on 1 January 2005. The Act creates a statutory right of access to information on regional and local public bodies, including central and local government, the health and education sectors, the armed forces and the police. The Act allows any individual, anywhere, the right to have access to information held in any form by a public authority, subject to 23 exemptions to protect information that should properly be kept confidential. The right of access is fully retrospective.

Decisions on disclosure under the Act should be based on a presumption of openness. The majority of exemptions are subject to a public interest test (where the public authority may only use the exemption if the public interest in withholding the information outweighs the public interest in disclosure).

More information about the Act can be found on the [illegible] website.

Copyright

First copyright in publicity and information work originated outside government would usually be owned by the originator or their employer. The fact that a department may have commissioned and paid for the work to be produced does not automatically give the department any rights of ownership to the material. Any reproduction of the material by the department requires the consent of the originator. Departments that commission material should consider seeking a formal assignment of copyright in favour of the Crown. This gives the department freedom to allow other contractors to use the material without payment to the original designer or writer. It also gives the department the power to prevent misuse of the material by the contractor or third parties. In most cases, the department will wish to waive copyright on the material and allow the public free use of it – but it cannot do this unless it owns the copyright.

On rarer occasions, when commercial exploitation of the material is possible, copyright allows the department to benefit, rather than the contractor.

The Office of Public Sector Information (OPSI) has produced guidance on copyright in works commissioned by the Crown, available on the OPSI website.

PROCEDURES

Government departments have responsibility for ensuring that the conventions on propriety are observed and that value for money is being achieved. The principal source of advice to ministers and heads of department is the departmental director of communications.

Officials planning publicity or advertising campaigns should consult their departmental director of communications at the earliest stage and heads of department should ensure that the director of communications and the finance division have sufficient opportunity to advise on proposals for paid publicity.

If the departmental arrangements work well, the need for reference to central advice should be very limited. Central advice should be sought in the following three, distinct circumstances:

- if a publicity proposal falls into a category where central reference is mandatory, as is at present the case for paid publicity in advance of legislative approval;
- if a proposal is novel or contentious in expenditure terms, in which case reference to the Treasury would be expected under the rules in *Government Accounting* and the public expenditure conventions generally; or
- where a minister, head of department or director of communications wants a second opinion on the compatibility of a proposal with the current central guidance.

Departments may wish to seek professional advice on the most appropriate and effective ways of meeting their publicity objectives. Directors of communication can provide this advice both directly and in consultation with the wide range of private sector specialists that they commission and manage. Directors of communication regularly exchange advice and experience with their opposite numbers in other government departments and, where necessary, consult the Central Office of Information (COI). Directors of communication can consult the Permanent Secretary, Government Communication on matters of propriety, if required. They will advise if the matter needs further consideration by the Propriety and Ethics Team in the Cabinet Office, or by the Head of the Home Civil Service.

The Treasury, and where necessary the Chief Secretary, Treasury, will continue to provide advice on value-for-money issues relating to government publicity and advertising.

Government publicity for proposals which are, or may become, the subject of legislation in Parliament remains a particularly sensitive area. Until such measures have become law, any government publicity must neither assume nor anticipate parliamentary approval. Ministers should make sure that all proposals for paid publicity (including, for example, leaflets) which refer to legislation in advance of parliamentary approval, together with the proposed distribution of the material, are considered by the Head of the Home Civil Service and copied to the Minister for the Cabinet Office.

Recruitment

Paid publicity is used extensively by the Government to recruit people in various public services. This is generally non-controversial, but the cost must still be justified.

[illegible]

As with any other kind of public expenditure, responsibility for ensuring the economy, efficiency and effectiveness of a publicity proposal lies with departments.

The Treasury is responsible for carrying out its normal role, which includes questioning whether a particular proposal is a justified use of public funds or whether adequate evidence about the effects it achieves is, or will be, available. The Accounting Officer's general value-for-money responsibility is, if anything, more acute in this area because of the high visibility of publicity expenditure and the potential intangibility of results. A rigorous examination of all proposals for publicity expenditure, starting from first principles, is therefore essential.

Legal position

Central government departments, unlike local authorities, do not rely on any specific statutory authority to spend money on advertising and publicity. Their use of publicity is covered by the principle that the Crown – and ministers of the Crown as its agents – can do anything an ordinary person can do, provided that there is no statute to the contrary and Parliament has voted the money. The safeguard is, of course, the Government's accountability to Parliament for all that it does and spends.

GOVERNMENT PUBLICITY CONVENTIONS

The communication should be relevant to government responsibilities

The specific matters dealt with by government publicity should be ones in which the Government has direct and substantial responsibilities. It is proper and necessary that the Government should explain and justify its policies and decisions, and, when necessary, inform, advise, alert or warn the public.

The communication should be objective and explanatory, not biased or polemical

The treatment of information should be as objective as possible. While such information will acknowledge the part played by individual ministers of the Government, personalisation of issues or personal image-making should be avoided.

Government information or publicity activities should always be directed at informing the public, even where it also has the objective of influencing the behaviour of individuals or particular groups (for example, 'Don't drink and drive' and other health and safety and consumer protection messages).

The communication should not be - or liable to be - misrepresented as being party political

It is proper to present and describe the policies of a minister, and to put forward the minister's justification in defence of them. This may have the effect of advancing the aims of the political party in government.

However, it is not proper to justify or defend those policies in party political terms, to use political slogans, expressly to advocate policies as those of a particular political party or directly attack policies and opinions of opposition parties and groups (though it may be necessary to respond to them in specific terms).

It is possible that a well-founded publicity campaign can create political credit for the party in government. But this must not be the primary or a significant purpose of government information or publicity activities paid for from public funds.

The communication should be conducted in an economic and appropriate way, and should be able to justify the costs as expenditure of public funds

The Government is accountable to Parliament for the use it makes of Civil Service staff or other public resources or expenditure. The Accounting Officer for the vote concerned has a particular responsibility to the Public Accounts Committee for the propriety of using public resources for these purposes, as well as for the economy, efficiency and effectiveness of their use. The resources employed should be proportional to the objectives or policy of the programme involved and justifiable on value-for-money grounds.

Government publicity campaigns (especially advertising campaigns) have to compete for attention with other publicity. To be effective, they need to be professionally presented in such a way as to register a clear message with the public. They should also impress upon the public that the Government is taking pains over the presentation of the facts and its message. Poor presentation can be as much a waste of public funds as the extravagant use of resources.

It would, however, be counterproductive if the level of spending on a publicity campaign impeded the communication of the message it was intended to convey, by itself becoming a controversial issue. To pass the test of acceptability, government publicity should always strike a balance in spending on modern, often expensive, communication techniques.

Ref: 279795/0307

From: Paul Jenkins [redacted]
Sent: 17 March 2010 16:56
To: Miller Calum [redacted]
Subject: public inquiry.doc

Calum

I hope this is roughly what you need.

On the "not inconceivable" risk of a successful JR, I think there is actually quite a significant risk that, if the inquiry was limited to News International and the motivation was widely seen as political, a judge would require a lot of persuasion that the Inquiry was being held for proper reasons. Also, if there was a sufficient political storm, we cannot rule out a judge being persuaded to hear, and decide, any JR before the election.

Paul

The grounds on which a judicial inquiry might be launched

The Inquiries Act 2005 provides for **statutory public inquiries**.

Section 1 of the Act provides that:

"A Minister may cause an inquiry to be held ...in relation to a case where it appears to him that-

(a) particular events have caused, or are capable of causing, public concern, or
(b) there is public concern that particular events may have occurred".

The first point to note is that this section is permissive. The Minister *may* cause an inquiry to be held if he is satisfied by either of the conditions in section 1. In particular, he would need to be satisfied that the case is one where there is **public concern**. A decision to hold an inquiry under section 1 could be challenged by an interested party by way of judicial review and that challenge could be upheld if the court determined that the decision to hold an inquiry was unreasonable bearing in mind the nature of the issue and the level of concern, or that the Minister had taken into account irrelevant considerations in deciding to hold the inquiry.

Historically the cases that have led to the establishment of a public inquiry have ranged from events which suggest a breakdown in the rule of law (such as the *Scott Inquiry*); through to cases where there has been a single death (such as the *Victoria Climbie Inquiry*); to cases that concern many deaths such as the *Shipman Inquiry*.

The common factor is a pressing public concern that something has happened that must be investigated openly and fairly by an independent body.

Certain characteristics can be identified in those public inquiries that have taken place:

- Large scale loss of life
- Serious health and safety issues
- Failure in regulation
- Other events of serious concern

In the last category would fit the Hutton Inquiry into the circumstances surrounding the death of Dr Kelly.

The necessary steps to be taken before a judicial inquiry is launched

An inquiry can be undertaken by a **chairman** alone or by a chairman with one or more members and appointments must be made in writing (s.4). The Act does not require the chairman to be a judge or indeed a lawyer (although that might well be appropriate in this sort of case). If the Minister proposes to appoint a judge he must first consult the President of the Supreme Court or the Lord Chief Justice (depending on the level of the judge) (s. 10).

The Minister responsible for setting up an inquiry is responsible for setting the **terms of reference** (s. 5) but he must consult the person he proposes to appoint, or has appointed before setting the terms of reference (s. 5(4))

Section 6 imposes an obligation on the Minster who proposes to hold an inquiry to "as soon as reasonably practicable" make a **statement to that effect to Parliament.** The statement must include who is to be, or has been, appointed as chairman; whether there are to be any other members and what the inquiry's terms of reference will be.

Whether in this case such an inquiry would be merited

[The following is based only on the Culture, Media and Sport Committee's Report].

The conclusions of the Culture, Media and Sport Committee regarding phone-hacking and blagging are recorded at paragraphs 492-495 of its report. Relevant to the issue of whether an inquiry would be merited In this case are the following points:

- It is recorded that the Committee's inquiry has revealed further facts, such as the pay offs made to Clive Goodman and Glenn Mulcaire. This might suggest that a public inquiry could be able to discover more about this matter – given, in particular, the way in which such an inquiry would take evidence (e.g. it could require witnesses to given evidence and produce documents – s. 21 – and take evidence under oath – s. 17(2)). In other words the whole story may not have yet emerged;
- There is a reference to a "culture" existing in the *News of the World* and other newspapers at the time which "at best turned a blind eye to illegal activities ... and at worst actively condoned it". This suggests that there may be a more widespread issue which a public inquiry could look at and also suggests that there may be a systemic failing of the sort that it would be usual for an Inquiry to consider [but this would require fairly wide terms of reference];
- The Committee is forthright in its criticism of the present and former executives of News International that it questioned. In particular it criticises the unwillingness to provide detailed information, claims of ignorance or lack of recall and "deliberate obfuscation". As in the point above these conclusions would tend to suggest that there is more in this matter that a public inquiry could profitably look at.

If these points tend to suggest that an inquiry might be merited the following conclusions tend to go the other way:

- The Committee is "encouraged" by the assurances it has received that such practices are now regarded as "wholly unacceptable and will not be tolerated". Furthermore the Committee states that "[w]e have seen no evidence to suggest that activities of this kind are still taking place and trust this is indeed the case".
- The report is essentially concerned with a localised issue involving the actions of a small number of people within the *News of the World*. Does that really amount to a matter of "public concern" justifying a public inquiry? On the other hand, if there is concern that the relevant practices may be more widespread, the terms of reference of the inquiry would need to extend to the press generally. But given the conclusion in the previous bullet, would that be justified?
- It is questionable whether a public inquiry would be likely to uncover more evidence than the police and the Committee were able to do, bearing in mind that the events in question occurred in 2005-7. Any documentary evidence

may no longer exist. However a statutory inquiry would have the compulsory powers mentioned above.

This conclusion indicates that the Committee was not apparently concerned that the practices it condemned were still occurring (if this concern existed it would be relevant). Furthermore a crucial justification for inquiries is often stated to be the opportunity to learn lessons for the future. In this case it is arguable that sufficient lessons have already been learned. (See for example the terms of reference in the Stephen Lawrence Inquiry "To inquire into the matters arising from the death of Stephen Lawrence on 22 April 1993 to date, in order, particularly, to identify the lessons to be learned for the investigation and prosecution of racially motivates crimes".)

The Committee's Report also has a section on the actions of the police (paragraphs 456 to 472) and the Report contains criticisms of the police's decision not to investigate the holding contract between Greg Miskiw and Glenn Mulcaire (paragraph 467). While these criticisms are serious there does not appear to be any suggestion of a systemic failure by the police and it must be doubtful whether a public inquiry could shine any particular fresh light on the police's actions, which were endorsed apparently by the CPS.

In summary

From the limited information available, it is doubtful whether this case would merit the holding of a public inquiry under the 2005 Act. Any decision to hold such an inquiry could be challenged by judicial review, particularly if the inquiry were extended to the media in general, and it is not inconceivable that such a challenge might succeed,

Other points

- Cost
- Setting a precedent – could increase calls for public inquiries e.g. following future adverse Select Committee reports.

<u>The sponsorship for such an inquiry</u>

The power to set up a statutory inquiry applies to any Minister. *Which* Minister is an administrative/political decision, not a legal one. Given the focus on the actions of the media, and the concerns of the Culture, Media and Sport Committee, lead responsibility would seem to lie most naturally with DCMS.

<u>The alternatives to an inquiry</u>

(1) *Non-statutory inquiry*. A Minister could set up a non-statutory inquiry outside the 2005 Act. It would have none of the compulsory powers of a statutory inquiry. Non-statutory inquiries (e.g. Chilcot) are normally used where the actions in question are mainly those of public officials, who can be expected (or to an extent required by government) to co-operate without the need for the inquiry to have powers of compulsion. If such co-operation is not forthcoming a non-statutory inquiry can be turned into a statutory one, with the relevant powers. The witnesses in this case are private individuals whom the Select Committee has accused of "collective amnesia", so it is difficult to see that a non-statutory inquiry would be appropriate here or would succeed in uncovering information where the Committee failed.

(2) *Invite the police to consider re-opening their investigation.* It could be said that the Select Committee report is a new factor justifying this. It would remain an operational decision for the police. It is doubtful whether the evidential and legal problems have changed. Could look weak if the police declined to re-open the investigation.
(3) *Reference to the Independent Police Complaints Commission.* Very doubtful whether this is an appropriate case. This was an operational judgment by the police, apparently supported by the CPS. Such decisions are obviously taken independently of Government and Parliament. Inevitably Government and Parliamentarians will not always agree with them. This does not mean there is systemic failure. Any intervention could appear politically motivated.
(4) *Reference to Information Commissioner.* ICO is responsible for enforcing the Data Protection Act but the real concern here is phone hacking/tapping, which is dealt with by the Regulation of investigatory Powers Act which is a matter for the police, not the ICO.

From: calum.miller[redacted]
Sent: 19 March 2010 17:21
To: jheywood[redacted]
Cc: Gray Sue - Propriety and Ethics Team (Cabinet Office); Paul Jenkins; Gus.ODonnell[redacted]
Subject: REST: Note on Public Inquiries

Jeremy

Please see attached minute to you from Gus on this.

Best wishes,

Calum

Calum Miller
Principal Private Secretary to Sir Gus O'Donnell, Cabinet Secretary
Cabinet Office, 70 Whitehall, London SW1A 2AS
[redacted]

RESTRICTED

JEREMY HEYWOOD

cc: Paul Jenkins
Sue Gray

Public Inquiries

You requested advice on the establishment of a judicial inquiry to explore the findings of the Culture, Media and Sport Select Committee into Press Standards, specifically those relating to phone-hacking and blagging, published in February.

This note covers five areas:

- The grounds for an inquiry
- Necessary steps to establish an inquiry
- The merits of an inquiry in this case
- The appropriate departmental sponsor
- Alternatives to an inquiry

Summary

(1) Ministers may instigate an inquiry on grounds of public interest, but such a decision is open to judicial review.

(2) The arguments – based on the Committee's report – in favour of the public interest test may weigh against an inquiry on the grounds that
   a. The Committee did not appear to believe the practices were still continuing.
   b. The time elapsed may make it unlikely that an inquiry would reveal more information than discovered by the police inquiry and the Committee's work.
   c. It would be challenging to specify the scope of the inquiry: arguably, the Committee's findings would not justify a wide-ranging review; however an inquiry targeted only at the 'News of the World' could be deemed to be politically motivated, making it more likely that any judicial review would be successful.

(3) Were there to be a judicial review of the inquiry, this could be held before an election.

(4) There are a number of alternatives to a public inquiry.

Detail

The grounds on which a judicial inquiry might be launched

RESTRICTED

The Inquiries Act 2005 provides for **statutory public inquiries**.

Section 1 of the Act provides that:

"A Minister may cause an inquiry to be held ...in relation to a case where it appears to him that-

(a)particular events have caused, or are capable of causing, public concern, or
(b)there is public concern that particular events may have occurred".

The first point to note is that this section is permissive. The Minister *may* cause an inquiry to be held if he is satisfied by either of the conditions in section 1. In particular, he would need to be satisfied that the case is one where there is **public concern**. A decision to hold an inquiry under section 1 could be challenged by an interested party by way of judicial review and that challenge could be upheld if the court determined that the decision to hold an inquiry was unreasonable bearing in mind the nature of the issue and the level of concern, or that the Minister had taken into account irrelevant considerations in deciding to hold the inquiry.

Historically the cases that have led to the establishment of a public inquiry have ranged from events which suggest a breakdown in the rule of law (such as the *Scott Inquiry*); through to cases where there has been a single death (such as the *Victoria Climbie Inquiry*); to cases that concern many deaths such as the *Shipman Inquiry*.

The common factor is a pressing public concern that something has happened that must be investigated openly and fairly by an independent body.

Certain characteristics can be identified in those public inquiries that have taken place:

- Large scale loss of life
- Serious health and safety issues
- Failure in regulation
- Other events of serious concern

In the last category would fit the Hutton Inquiry into the circumstances surrounding the death of Dr Kelly.

The necessary steps to be taken before an inquiry is launched

An inquiry can be undertaken by a **chairman** alone or by a chairman with one or more members and appointments must be made in writing (s.4). The Act does not require the chairman to be a judge or indeed a lawyer (although that might well be appropriate in this sort of case). If the Minister proposes to appoint a judge he must first consult the President of the Supreme Court or the Lord Chief Justice (depending on the level of the judge) (s. 10).

The Minister responsible for setting up an inquiry is responsible for setting the **terms of reference** (s. 5) but he must consult the person he proposes to appoint, or has appointed before setting the terms of reference (s. 5(4))

Section 6 imposes an obligation on the Minster who proposes to hold an inquiry to "as soon as reasonably practicable" make a **statement to that effect to Parliament.** The statement must include who is to be, or has been, appointed as chairman; whether there are to be any other members and what the inquiry's terms of reference will be.

Whether in this case such an inquiry would be merited

[The following is based only on the Culture, Media and Sport Committee's Report].

The conclusions of the Culture, Media and Sport Committee regarding phone-hacking and blagging are recorded at paragraphs 492-495 of its report. From this, it would appear there are some arguments in favour of an inquiry:

- It is recorded that the Committee's inquiry has revealed further facts, such as the pay offs made to Clive Goodman and Glenn Mulcaire. This might suggest that a public inquiry could be able to discover more about this matter – given, in particular, the way in which such an inquiry would take evidence (e.g. it could require witnesses to given evidence and produce documents – s. 21 – and take evidence under

oath – s. 17(2)). In other words the whole story may not have yet emerged;

- There is a reference to a "culture" existing in the *News of the World* and other newspapers at the time which "at best turned a blind eye to illegal activities ... and at worst actively condoned it". This suggests that there may be a more widespread issue which a public inquiry could look at and also suggests that there may be a systemic failing of the sort that it would be usual for an inquiry to consider (but this would require fairly wide terms of reference);
- The Committee is forthright in its criticism of the present and former executives of News International that it questioned. In particular it criticises the unwillingness to provide detailed information, claims of ignorance or lack of recall and "deliberate obfuscation". As in the point above these conclusions would tend to suggest that there is more in this matter that a public inquiry could profitably look at.

However, the following conclusions tend to argue against an inquiry:

- The Committee is "encouraged" by the assurances it has received that such practices are now regarded as "wholly unacceptable and will not be tolerated". Furthermore the Committee states that "[w]e have seen no evidence to suggest that activities of this kind are still taking place and trust this is indeed the case".
- The report is essentially concerned with a localised issue involving the actions of a small number of people within the *News of the World*. Does that really amount to a matter of "public concern" justifying a public inquiry? On the other hand, if there is concern that the relevant practices may be more widespread, the terms of reference of the inquiry would need to extend to the press generally. But given the conclusion in the previous bullet, would that be justified?
- It is questionable whether a public inquiry would be likely to uncover more evidence than the police and the Committee were able to do, bearing in mind that the events in question occurred in 2005-7. Any documentary evidence may no longer exist. However a statutory inquiry would have the compulsory powers mentioned above.

This conclusion indicates that the Committee was not apparently concerned that the practices it condemned were still occurring (if this concern existed it would be relevant). Furthermore a crucial justification for inquiries is often stated to be the opportunity to learn lessons for the future. In this case it is arguable that sufficient lessons have already been learned. (See for example the terms of reference in the Stephen Lawrence Inquiry "To inquire into the matters arising from the death of Stephen Lawrence on 22 April 1993 to date, in order, particularly, to identify the lessons to be learned for the investigation and prosecution of racially motivates crimes".)

The Committee's Report also has a section on the actions of the police (paragraphs 456 to 472) and the Report contains criticisms of the police's decision not to investigate the holding contract between Greg Miskiw and Glenn Mulcaire (paragraph 467). While these criticisms are serious there does not appear to be any suggestion of a systemic failure by the police and it must be doubtful whether a public inquiry could shine any particular fresh light on the police's actions, which were endorsed apparently by the CPS.

In summary

From the limited information available, it is doubtful whether this case would merit the holding of a public inquiry under the 2005 Act. Any decision to hold such an inquiry could be challenged by judicial review, particularly if the inquiry were extended to the media in general, and it is not inconceivable that such a challenge might succeed.

Other points

- Cost – any inquiry carries costs to the public purse which will depend on the breadth of the terms of reference and the composition of the inquiry panel.
- Setting a precedent – creating an inquiry in this case could increase calls for public inquiries e.g. following future adverse Select Committee reports.
- Timing – the immediate proximity to an election would inevitably raise questions over the motivation and urgency of an inquiry.

The sponsorship for such an inquiry

The power to set up a statutory inquiry applies to any Minister. *Which* Minister is an administrative/political decision, not a legal one. Given the focus on the actions of the media, and the concerns of the Culture, Media and Sport Committee, lead responsibility would seem to lie most naturally with DCMS.

The alternatives to an inquiry

(1) *Non-statutory inquiry.* A Minister could set up a non-statutory inquiry outside the 2005 Act. It would have none of the compulsory powers of a statutory inquiry. Non-statutory inquiries (e.g. Chilcot) are normally used where the actions in question are mainly those of public officials, who can be expected (or to an extent required by government) to co-operate without the need for the inquiry to have powers of compulsion. If such co-operation is not forthcoming a non-statutory inquiry can be turned into a statutory one, with the relevant powers. The witnesses in this case are private individuals whom the Select Committee has accused of "collective amnesia", so it is difficult to see that a non-statutory inquiry would be appropriate here or would succeed in uncovering information where the Committee failed.

(2) *Invite the police to consider re-opening their investigation.* It could be said that the Select Committee report is a new factor justifying this. It would remain an operational decision for the police. It is doubtful whether the evidential and legal problems have changed. Could look weak if the police declined to re-open the investigation.

(3) *Reference to the Independent Police Complaints Commission.* Very doubtful whether this is an appropriate case. This was an operational judgment by the police, apparently supported by the CPS. Such decisions are obviously taken independently of Government and Parliament. Inevitably Government and Parliamentarians will not always agree with them. This does not mean there is systemic failure. Any intervention could appear politically motivated.

(4) *Reference to Information Commissioner.* ICO is responsible for enforcing the Data Protection Act but the real concern here is phone hacking/tapping, which is dealt with by the

Regulation of Investigatory Powers Act which is a matter for the police, not the ICO.

GUS O'DONNELL
19 March 2010

THE RT. HON. GORDON BROWN M.P.
Member of Parliament for Kirkcaldy & Cowdenbeath

HOUSE OF COMMONS
LONDON SW1A 0AA

Sir Gus O'Donnell
Cabinet Office
70 Whitehall
London SW1

7th September 2010

Dear Gus

You will recall that I asked you during my time at 10 Downing Street, for your advice on a judicial enquiry into interference with telephones.

You suggested then there was insufficient evidence to justify my proposal.

The evidence seems to grow by the day to suggest that the interference with telephones was a widespread practise that requires proper investigation.

It is my view that an inquiry cannot now be avoided and needs to be held.

Yours sincerely

GORDON BROWN MP

CabinetOffice

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The Rt. Hon. Gordon Brown M.P.
Member of Parliament for Kirkcaldy & Cowdenbeath
House of Commons
SW1A 0AA

10 September 2010

Dear Gordon,

Thank you for your letter of 7 September.

This issue is now under review by the Metropolitan Police and also subject to an Inquiry by the Standards and Privileges Committee. It would not be appropriate for me to make any further comment whilst those reviews are underway.

Gus O'Donnell